



BUREAU OF WATER PROTECTION AND LAND REUSE  
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**Comments of Connecticut Fund for the Environment / Save the Sound on the  
Department of Environmental Protection's  
Notice of Intent to Adopt Regulations on October 13, 2009.  
February 3, 2010**

*Connecticut Fund for the Environment is a statewide environmental organization using law, science and public education to defend and improve the air land and water in and around Connecticut and the Long Island Sound. Save the Sound has existed since 1972 and has been a permanent program of CFE since 2005. CFE/Save the Sound represents over 6,000 members from 4,800 households and submits these comments on their behalf.*

Connecticut Fund for the Environment ("CFE") supports the adoption of the proposed streamflow regulations, Sections 26-141b-1 to 26-141b-9, inclusive, with certain modifications discussed below. Before discussing our concerns with the proposed regulations in detail, we first want to note that we strongly support the regulations as a whole and urge their timely passage. Delaying implementing these regulations would continue the Department of Environmental Protection's ("DEP") violation Section 26-141b of the general statutes which directed DEP to promulgate these regulations by December 31, 2006 and would put our streams and rivers at continued and unnecessary risk.

Although CFE supports the proposed regulations generally, we provide the following comments. Generally, we believe that the regulations need clearer language so they can be enforced when there is a threat to the health of the state's rivers and streams from insufficient flow. Certain definitions need to be clarified; enforcement authority during the phase in period needs to be defined; presumptive standards should be enforceable standards absent a compact; the narrative standards need greater specificity and clarity in order to be easily enforced; and the standards should try to improve water quality through preventing backsliding and providing incentive for improvements.

**I. Definitions Of "River or Stream System" And "River or Stream Segment" Should Be Defined Correctly<sup>1</sup>:**

"River or stream system" defined in section 26-141b-2(34) should be defined as "the water in the river or stream channel of a river or stream, including all tributary

<sup>1</sup> The subsections in this section are listed numerically. In all other saections, subsections are first listed alphabetically. Consistency would require that the definitions run (a)-(nn).

streams that drain into the channel, and the subsurface groundwater that contributes flow to the river or stream." There is no basis for defining a river or stream by water "upstream of any point..." Additionally, groundwater regulation should not be limited to only groundwater "that contributes flow to **sustain** flow..." but, should be all groundwater that contributes any flow to a river or stream. And, the definition of "River or Stream Segment" should include contributing groundwater consistent with the definition of "River or Stream System."

The term "river or stream system" should include all parts of the stream. A river or stream system can not rationally be limited to water "upstream" of any given point. Limitations in this manner are incompatible with a description of a "system." The word system is defined as "a regularly interactive or interdependent group of items forming a unified whole." Webster's Ninth New Collegiate Dictionary, 1983, Merriam-Webster Inc. The basic premise of a system is the interaction of all contributing individual segments to make up a whole unit. That is, all river or stream segments interact to make up a river or stream system. Arbitrarily limiting the definition to all points upstream is incorrect. Further, because the regulations can apply to "river or stream segments," limiting the definition of the system is completely unnecessary and could create unforeseeable consequences.

Further, the proposed regulations unnecessarily limit the inclusion of groundwater in defining the term "river and stream systems" to "ground water that contributes flow to sustain flow in the river." This language is ambiguous. A reasonable interpretation of this language is that groundwater is only part of a river or stream system if but for the contribution there would not be sustained flow in the river or stream. This is a much too narrow definition. Groundwater is part of the system if it contributes **any** flow to the river or stream, not just flow that sustains flow in the river. Removing any contributing flow to the river or stream will affect the flow of water in the river or stream regardless if the flow is necessary to sustain flow. Accordingly, the term "river or stream system" should be defined as "the water in the river or stream channel of a river or stream, including all tributary streams that drain into the channel, and the subsurface groundwater that contributes flow to the river or stream."

The term "river or stream segment," section 22a-161b-2(33), should be defined as "a discrete, contiguous reach of river or stream channel and contributing groundwater for which a uniform classification has been adopted." By excluding groundwater from the definition of "river or stream segment" there is a possibility that certain groundwater withdrawals will not be regulated because a literal interpretation of the regulations does not refer to groundwater in the term "river or stream segment" unlike the term "river or stream system." This is plainly not DEP's intent, so the language should be consistent with the definition of "river or stream system."

## **II. DEP Needs To Implement Some Basic Regulations During The Phase In Period.**

DEP's phased in approach to streamflow regulation leaves an unnecessary gap in protection of the rivers and streams during the phase in time period. This should be corrected. DEP should reserve the power to mandate a release or reduction in withdrawal

if failure to do so would, or is reasonably likely to have, the effect of unreasonably impairing a stream or river.

Reserving this authority would avoid the problem DEP encountered in *City of Waterbury v. Town of Washington*, 260 Conn. 506 (2002), where the Connecticut Supreme Court ruled that even though DEP testified that its regulations did not adequately protect the environment, DEP was powerless to prevent the harm without amending its regulations. *City of Waterbury*, 260 Conn. at 571; but see *Burton v. Comm'r of Env'tl. Prot.*, 291 Conn. 789, 811 n.19 (2009) (leaving open the possibility that *City of Waterbury* may be inconsistent § 22a-20). The regulations, as written, could put DEP in the same position it found itself in the *City of Waterbury* case, even though the current regulations are being adopted so as to avoid that situation.

Section 26-141b-6 phases regulations of dams and other structures in from six months to 10 years after a river or stream system has been classified pursuant to Section 26-141b-5.<sup>2</sup> The "effective date" of classification is the date "[n]otice of the adopted classification of any river or stream system or segment [is] published in the Connecticut Law Journal." Section 26-141b-6(b)(5). Other than for a dam on a class 1 segment of stream<sup>3</sup> there are no regulatory standards at all for five years after classification.<sup>4</sup> See Sec. 26-141b-6(a)-(b). Sections 26-141a-1 to 26-141a-8, inclusive, are not applicable during this time-period because the "effective date" in Section 26-141b-6 is tripped by the publication of the classification in the Connecticut Law Journal. This is an unnecessary regulatory gap.

Additionally, under the phased in approach, stocked streams are regulated under the old regulations until such stream is classified. DEP estimates that river and stream systems and segments thereof will be classified between one and five years after adoption of the regulations. Accordingly, for the years DEP is classifying rivers and streams, non-stocked rivers will remain completely unregulated. It is even possible that non-stocked streams can avoid any enforcement because under Section 26-141b of the General Statutes, the old regulations remain in effect only "until the Commissioner of Environmental Protection adopts new regulations pursuant to this section." Because prior to the 2005 amendments to Section 26-141b non-stocked streams were outside the regulatory scheme actions that would cause unreasonable impairment to a non-stocked stream could be subject to a CEPA action from DEP. See Conn. Gen. Stat. § 22a-16. But, once the new regulations are adopted, non-stocked streams are no longer outside the regulatory scheme and thus arguably are not subject to a potential CEPA action. See *City of Waterbury*, 260 Conn. 506 (2002). The absence of a CEPA regulation does not merely prohibit actions by private citizens but also an action by DEP. *Id.* Accordingly, DEP should reserve the authority to bring an enforcement action if any activity which affects

<sup>2</sup> The regulations are not clear if the original classification of river and stream systems will have river or stream segment classifications or only system classification. The title of Section 26-141b-5 is "Adoption of river or stream system classifications" which implies only system classifications. Subsection b, however, implies only river or stream segments will be classified while subsection c recognizes the possibility of classification of both systems and segments. Use of the terms "system" and "segment" need to be reviewed for consistency and tightening.

<sup>3</sup> For dams on class 1 segments there are no regulatory standards for six months. Section 26-141b-6(a)(1).

<sup>4</sup> For this section assume that "Presumptive Standards" are not actually presumptive but the actual applicable standard. This assumption will be discussed below. In the event that the presumptive standards are indeed only presumptive, it is unclear what standard applies for years five through ten following classification.

the flow of a river or stream would, or is reasonably likely to have, the effect of unreasonably impairing the stream or river. This basic language provides basic protection of the state's rivers and streams and avoids the problem DEP faced in *City of Waterbury*.

In addition to reserving authority to prohibit activity if it would or is likely to have the effect of harming the environment, DEP should create some standard during the phase in period. DEP's plain language guide to the regulations, "Stream Flow: The Next Two Decades" states, "During the first 5-year period following [classification], individual dam owners [and operators of other structures] are required to continue to operate in accordance with their current operational rules and maintain existing practice ...." This requirement, however, is not in the regulations. It should be.

Section 26-141b-3(b) should be amended as follows:

Any person owning or operating a dam or other structure that impounds or diverts the waters of a river or stream system or that affects the flow of water in such a system shall comply with the Stream Flow Standards and Regulations starting on the applicable effective date as prescribed by section 26-141b-6 of the Regulations of Connecticut State Agencies. Prior to any applicable effective date prescribed in section 26-141b-6 of the Regulations of Connecticut State Agencies, the minimum stream flow standards established in sections 26-141a-1 to 26-141a-8, inclusive, of the Regulations of Connecticut State Agencies shall remain in effect. **Additionally, until the standards in section 26-141b-6 of the Regulations of Connecticut State Agencies are implemented (generally five years after the effective date), any person owning or operating a dam or other structure that impounds or diverts the waters of a river or stream system or that affects the flow of water in such a system shall continue to operate in accordance with their current operational rules and maintain existing practice.**

We recognize that this language does not necessarily provide a clear enforceable standard. It does, however, make clear that large changes to an existing operation should not occur.

### **III. Presumptive Standards Should Be Applicable Standards and Narrative Standards Should Be Subsumed Into Section Seven And More Specific**

#### **A. Presumptive Standards:**

Section 26-141b-6 of the regulations should be entitled "Applicable Standards" and the "Narrative Standards" section should be subsumed into section seven. The "Applicable Standards" should apply unless the operator has entered into a compact with DEP which are required to meet the narrative standards.

It is unclear what DEP means by "Presumptive Standards." That is, it is unknown if all dams and structures have to comply with the presumptive standards unless they are given a variance or become a part of a flow management compact contemplated in

section seven or if the only mandatory standard is the "Narrative Standards" defined in section four.

The lack of clarity on what is the applicable standard stems from two causes. First, the title of section six is "Presumptive Standard" which in the legal world implies a rebuttable standard rather than a mandatory standard. Our understanding of the regulations is that DEP did not intend for section six to be rebuttable but rather the applicable standard in the absence of a variance or a compact. This should be made clear in the regulations.

The second source of confusion on this issue is section 26-141b-3(c)(16) which exempts operators that have entered into a compact pursuant to these regulations. Compliance with regulations cannot also be a basis for exemption from the regulations. Further, this exemption makes the stand alone narrative standards section confusing because it is totally unclear when they apply. If an operator is exempt from the regulations by entering into a compact, the narrative standards don't apply. Also, if in the absence of a compact or variance, the "Presumptive Standards" apply, the "Narrative Standards" don't apply. Thus, the "Narrative Standards" are superfluous. Accordingly, the exemption should be deleted and the narrative standards should be incorporated into section seven as one of the standards necessary to obtain a compact with DEP.

In summary, the "Presumptive Standards" section should be re-titled "Applicable Standards." The exemption for entering into a compact should be eliminated. The "Narrative Standards" section should be subsumed into the flow compact section. It should also be clearly written that the "Applicable Standards" section applies unless there is a variance or a compact.

#### *B. Narrative Standards:*

The narrative standards need more specificity and Class 4 should be eliminated or at least amended to create a minimum level of protection. Narrative standards, as the Federal Clean Water Act has shown, are notoriously difficult to enforce. See Memorandum of Benjamin H. Grumbles, Assistant EPA Administrator, Nutrient Pollution and Numeric Water Quality Standards, May 25, 2007 available at <http://www.epa.gov/waterscience/criteria/nutrient/files/policy20070525.pdf> (stating "Notable progress has been made relying on site-specific application of narrative standards to develop nutrient TMDLs. But this can often be difficult, resource intensive and time-consuming."). They are difficult to enforce because it is difficult to determine when and if there was a violation. The more specific and numeric based regulations are, the easier they are to enforce. The current language in the "Narrative Standards" is vague and would be difficult to enforce. Section 26-141b-4 lists the narrative standards. These standards need to be more specific for enforceability purposes. The narrative standards need to provide some numeric guidance or other clear criteria that would make the narrative standards more enforceable.

The narrative standards rely on vague terminology. For example, Class 2 waters need to exhibit "near-natural variation of flows and water levels characteristic of systems that have been minimally altered by human activities." This description is not particularly helpful for enforcement. There is no guide as to what "near natural" or "minimally altered" mean. How does "near natural" differ from Class 3, which allows

for "moderately altered" conditions? Who makes these judgments? More specific reference points are needed. If possible, some numeric standard should be included.

The Class 4 standard is particularly troubling and should be eliminated. In fact, the standard does not provide any kind of minimum level harm permitted. Classes 1-3 mandate that the river meet a certain minimum level of biological productivity and exhibit only a certain deviation from its natural condition.<sup>5</sup> The Class 4 standard provides no minimum condition what-so-ever but rather states that a stream segment "may exhibit substantially altered stream flow conditions..." Section 26-141b-4(d) (emphasis added). This classification appears intended to remove certain stream segments from regulation all together. This was not the intent of the Act. If Class 4 is to be retained, DEP needs to write the Class 4 regulation so that there is actually an enforceable standard. We suggest language along the lines of: "A river or stream of segment classified as 'Class 4' pursuant to the Stream Flow Standards and Regulations may exhibit substantially altered stream flow conditions caused by human activity, but shall, at a minimum, exhibit sufficient flows and water levels characteristic of systems that can support minimal levels of natural biological activity. But that, river or stream segments classified as 'Class 4' that cannot naturally support minimal levels of natural biological activities may not be required to do so."

An additional problem of only having narrative standards apply is that narrative standards do not consider cumulative impact. A possible interpretation of the narrative standards would require showing but for an individual operator's activity the narrative standard would not be met. This is not an appropriate way to regulate stream flow. To avoid this, section 26-141b-3(b) needs to be altered. Section 26-141b-3(b) states: "Any person owning or operating ... shall comply with the Stream Flow Standards and Regulations..." It should state "Any person owning or operating ... shall comply with the applicable standards and/or shall not cause or contribute to a violation of applicable standards..." When enforcing narrative standards, it is necessary that there only need be a showing of contribution to a violation.

#### **IV. Back-sliding Should Only Be Allowed When There is Substantial Need and There Should Be An Incentive To Improve Flow**

There should be a presumption against reduction in classification. Section 26-141b-5(c)(D) requires an "overriding social or economic justification for changing" a classification down to a Class 4. This should be applicable to all reductions in classifications, not just to Class 4. If DEP determines that a lower bar is appropriate for classification down to a Class 2 or 3 level than that standard should be "substantial need" as opposed to "legitimate need." The term "legitimate need" does not strongly enough denote a bias against a downward classification. A legitimate industry need could, theoretically, simply be that it would be cheaper to operate under a less restrictive classification. An alternative standard could be that the benefits of a reduction in class clearly outweigh the costs of denying the reduction.

<sup>5</sup> As written, the regulations do not actually present a minimum standard but actually mandate that the stream be a condition consistent with the applicable classification. The classifications should be described as an "at a minimum provide" and "at a minimum exhibit" rather than "shall, at all times provide" and "shall, at all times, exhibit."

Further, any reduction in classification should only be temporary and be coupled with a plan that would allow the classification to be brought back up. Without the bias against reduction in classification of rivers and streams the pressures of development will create a steady decline in levels of protection. Nothing in the regulations requires owners and operators to find ways to reduce impact on rivers and streams ten years after classification. In the absence of this kind of pressure, there needs to be some method of preventing a decline in protection.

Finally, section 26-141b-6(c) allows for variances. Only the government or owner operators are allowed to request variances. Thus, stricter variances are not contemplated. The public should be allowed to petition for a variance for greater restriction. Further, requests for variances should require a demonstration of steps that will be taken to reduce the need for future variances.

## **V. Public Challenge To Compacts**

Although the regulations allow for public participation before DEP enters into a "flow management compact," *see* Regs. Conn. State Agen. § 26-141b-7(f), there is no provision for the public to challenge the compacts if they do not adequately protect the river or stream system or are not likely to comply with the narrative standards. The regulations should provide an avenue for the general public to obtain a hearing and ruling if a "flow management compact" is insufficient.

Connecticut's rivers and streams are held in trust for the state's citizens. They are not mere resources to be divvied up. The public is entitled to a mechanism for ensuring that the regulations are properly enforced. Absent the public's ability to challenge compacts, the regulations allow for adhoc and unchecked regulation.

## **VI. Escape Hatch**

DEP should include a section that states that compliance with regulations does not per se adequately protect the environment. Compliance should be a presumption at most. DEP (and public) should be allowed to required increased flow if necessary. As discussed previously, such a clause would avoid the type of situation that arose in the *City of Waterbury* case.

## **VII. Increased Monitoring Of Flows**

Sec. 26-141b-8 addresses record keeping and reporting requirements. There is, however, no requirement that owners and operators monitor the flow in the rivers and streams. Owner/Operators of dams and structures should be required to record on a regular basis (daily or weekly) the flow on the relevant segment of stream. Regulated entities could possibly pool together on tracking this information.

### VIII. Regulation of Groundwater Is Clearly Within DEP's Authority Under This Act

The regulated community seems intent on denying that section 22a-141a-b allows for regulation of groundwater. Because the regulated community's self-serving interpretation is patently inconsistent with the plain language of the statute, we wish to briefly address this issue. The statute does not regulate either groundwater or surface water. Rather, the statute regulates dams and structures that affect flow in the state's rivers and streams: "Whenever any dam or other structure is maintained in this state which impounds, or diverts the waters of a river or stream **or which dam or other structure affects the flow of water in such a river or stream...**" C.G.S. § 26-141a (emphasis added).

Determining which "other structures" affect the flow of water in rivers and streams is a technical question within the discretion of DEP to determine. See *Wheelabrator Lisbon, Inc. v. DPUC*, 283 Conn. 672, 692 (2007) ("[In] light of the extremely complex and technical regulatory and policy considerations implicated by this issue, we are not persuaded that we may substitute our judgment for that of the department. Rather, this 'is precisely the type of situation that calls for agency expertise.' (Internal quotation marks omitted.) *MacDermid, Inc. v. Dept. of Environmental Protection*, 257 Conn. 128, 139, 778 A.2d 7 (2001); see also *Christopher R. v. Commissioner of Mental Retardation*, 277 Conn. 594, 611, 893 A.2d 431 (2006) ('we generally defer to an agency with expertise in matters requiring such a technical . . . determination')."). DEP has properly exercised its authority to regulate groundwater wells that affect the flow in rivers and streams.

Several representatives of the regulated community questioned DEP's authority to regulate groundwater pursuant to sections 26-141a-b. This position is inconsistent with their recognition that groundwater pumps affect the flow in rivers and streams. See January 20, 2010, Testimony of Maureen Westbrook, The Connecticut Water Company, Vice President Customer Service and Regulatory Affairs. Given that there is consensus that groundwater pumps affects the flow in rivers and streams, it follows that those structures clearly fall within the regulatory scope of the statute. Accordingly, DEP appropriately exercised its discretion by regulating groundwater withdrawals in these regulations.

Respectfully submitted,



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